

IN THE COURT OF APPEALS OF IOWA

No. 3-853 / 12-0590
Filed October 23, 2013

GATBEL CHANY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

Chany appeals from the dismissal of his application for postconviction relief. **AFFIRMED.**

Susan R. Stockdale, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John P. Sarcone, County Attorney, and Jeff Noble, Assistant County Attorney, for appellee State.

Considered by Vaitheswaran, P.J., Doyle, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

HUITINK, S.J.

Gatbel Chany filed an application for postconviction relief (PCR) asserting his trial counsel was ineffective in failing to file a motion in arrest of judgment and motion to withdraw his plea of guilty to three counts of second-degree robbery and one count of ongoing criminal conduct. The district court dismissed the action on the State's motion, finding no legal basis existed for the PCR. We review the court's ruling for errors at law. See Iowa R. App. P. 6.907.

Iowa Code section 610A.2 (2011) allows the court to dismiss a civil action brought by an inmate if the action is frivolous in whole or in part. This section applies to PCR proceedings because such proceedings are civil actions. *Goodrich v. State*, 608 N.W.2d 774, 776 (Iowa 2000). In determining whether an action is frivolous, the court may consider whether the action "is without substantial justification, or otherwise has no arguable basis in law or fact, including that the action . . . fails to state a claim upon which relief could be granted, or the action . . . cannot be supported by a reasonable argument for a change in existing law." Iowa Code § 610A.2(2)(a).

Chany's PCR application alleges trial counsel was ineffective in failing to file a motion to withdraw the guilty plea and in failing to file a motion in arrest of judgment. It states:

At the sentencing hearing, Chany claimed he was innocent and stated he did not want to plea [sic] guilty, but wanted to go to trial. Chany's counsel stated, "I did not force my client to plead guilty. No one did. And so I don't believe there are any grounds to withdraw his plea, so I am not seeking to do that." The Court misconstrued Chany's Motion to Withdraw Plea for a Motion in Arrest of Judgment and denied Chany's Motion in Arrest of Judgment.

Viewing the pleading in the light most favorable to Chany, see *Sierra Club Iowa Chapter v. Iowa Dep't of Transp.*, 832 N.W.2d 636, 640 (Iowa 2013), we find no basis upon which relief can be granted. Chany cannot complain counsel was ineffective for failing to file a motion to withdraw his guilty plea because he did so himself at the sentencing hearing. If the district court erroneously interpreted that motion as a motion in arrest of judgment, that error should have been raised on direct appeal rather than in a PCR action alleging ineffective assistance of counsel. Chany also cannot complain counsel was ineffective for failing to file a motion in arrest of judgment; the district court considered Chany's motion to withdraw as a motion in arrest of judgment and denied it. Counsel had no duty to bring a motion that had already been raised and denied. See *State v. Dudley*, 766 N.W.2d 606, 620 (Iowa 2009) (holding counsel has no duty to raise issues that have no merit).

Because the PCR action has no arguable basis in law or fact, we affirm.

AFFIRMED.